

ATALE (Bar No. 121416)
CELIA M. JACKSON (Bar No. 124508)
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104-2878
Telephone: (415) 772-6000
Facsimile: (415) 772-6268
Email: richard.denatale@hellerehrman.com
Email: celia.jackson@hellerehrman.com

Attorneys for Plaintiffs
LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.,

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY; EXECUTIVE RISK SPECIALTY
INSURANCE COMPANY; UNITED STATES
FIRE INSURANCE COMPANY; MARKEL
AMERICAN INSURANCE COMPANY and
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants,

AND RELATED COUNTER- AND CROSS-
CLAIMS.

Case No.: C-07-2853 SBA

**DECLARATION OF CELIA M.
JACKSON IN REPLY TO
PLAINTIFFS' MOTION FOR LEAVE
TO FILE FIRST AMENDED
COMPLAINT**

Date: October 2, 2007

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

1 I, Celia M. Jackson, declare:

2 1. I am an attorney in the law firm of Heller Ehrman LLP, counsel of record for
3 Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together, "LensCrafters") in this
4 action. I have personal knowledge of the matters stated in this declaration, and if I were asked to
5 testify regarding these matters, I could competently do so.

6 2. Attached to this declaration as Exhibit 1 is a true and correct copy of a transcript of a
7 status conference held on August 29, 2007 in *United States Fire Ins. Co. v. Luxottica U.S. Holdings*
8 *Corp., et al.*, Supreme Court of the State of New York, County of New York, Index No. 107338/07.
9 (the "New York Action").

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Executed this 18th day of September 2007 in San Francisco, California.

12
13 /s/ Celia M. Jackson

14 Celia M. Jackson
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 60

- - - - - X

UNITED STATES FIRE INSURANCE COMPANY,
Plaintiff,

INDEX NUMBER:

- against - 107338/07

LUXOTTICA U.S. HOLDINGS CORP., LUXOTTICA GROUP S.P.A.,
UNITED STATES SHOE CORPORATION, LENS CRAFTERS, INC.,
EYEMED, INC., EYEMED VISION CARE LLC, EYEXAM 2000,
LIBERTY MUTUAL FIRE INSURANCE COMPANY, MARKET AMERICAN
INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY,
Defendants.

- - - - - X

60 Centre Street
New York, New York
August 29, 2007
MOTIONS

BEFORE:

HONORABLE BERNARD FRIED, Justice

APPEARANCES:

CARROLL MCNULTY KULL, LLC
Attorney for the Plaintiff
570 Lexington Avenue
New York, New York 10022

BY: JOHN P. DeFILIPPIS, ESQ., Of Counsel

HELLER, EHRMAN, WHITE & MCAULIFFE, LLP
Attorneys for Luxottica, Lens Crafters, Eyexam,
United States Shoe and Eyemed Vision
7 Times Square
New York, New York 10036-6524

BY: RICHARD DeNATALE, ESQ.,
LISA M. CIRANDO, ESQ., Of Counsel

WILLOUGHBY, STUART & BRENING
Attorneys for Liberty Mutual
50 West San Fernando, Suite 400

San Jose, California 95113

BY: ALEXANDER F. STUART, ESQ., Of Counsel

RIVKIN RADLER, LLP

Attorneys for Liberty Mutual

EAB Plaza

Uniondale, New York 11556-0111

BY: JASON B. GURDUS, ESQ., of Counsel

LESTER, SCHWAB, KATZ & DWYER, LLP

Attorneys for Markel American Insurance

120 Broadway - 38th Floor

New York, New York 10271-0071

BY: ERIC A. PORTUGUESE, ESQ., of Counsel

LUSTIG & BROWN, LLP

Attorneys for Westchester Fire

28 West 44 Street

New York, New York 10036

BY: MICHAEL P. LAGNADO, ESQ., Of Counsel

Myron Calderon

Official Court Reporter

Motion

MORNING SESSION

THE COURT: Who is from California?

MR. STUART: I am, your Honor.

THE COURT: You are Mr. Stuart?

MR. STUART: Correct, your Honor.

THE COURT: Let me deal with a few matters first, and I understood from my law clerk that you were in route, Mr. Stuart, from California; and the question was whether you could appear today even though you have a pro hoc vice and you were admitted to what bar?

MR. STUART: I am admitted to the California bar, your Honor, all courts in California, Federal Courts.

THE COURT: And I assume you are in good standing?

MR. STUART: Yes.

THE COURT: I will permit you to appear for the courtesy of these proceedings. When the application comes here I assume it would be unopposed.

MR. STUART: The application was presented to the Court, and it is not opposed.

THE COURT: I haven't seen it yet. I have a stack of papers I am still reading from my vacation. If it is in there, I will sign it.

Welcome to New York.

1 Motion

2 MR. STUART: Thank you, your Honor.

3 THE COURT: All right, the second issue that
4 is not really an issue, but there has been a series of
5 letters that I have received, and I think there may
6 have been affirmations, on the issue of whether or not
7 this case should be in the Commercial Division.

8 I have read the papers originally and I am
9 aware of the fact that this is a case which skirts the
10 margins of the Commercial Division Rules, but there is
11 also a decision from the Administrative Judge of this
12 county in which she has concluded in a similar
13 situation where in fact it was sent out of the
14 Commercial Division. Being familiar with that
15 decision, I have discretion if I think it belongs here.
16 I have decided this case will remain in the Commercial
17 Division of the Supreme Court of this county.

18 Once I did that, I issued an order, I think I
19 issued an order, and I set it down today for a
20 preliminary conference on this action.

21 So is there anything else I need to deal with
22 before I turn to the substance of what you are doing
23 here this morning?

24 Mr. DeFilippis, in a nutshell why don't you
25 take the podium.

26 This is a coverage action?

1 Motion

2 MR. DeFILIPPIS: Yes, a declaratory judgment
3 action brought by United States Fire, one of the excess
4 insurers. This is a declaratory judgment action
5 brought by United States fire.

6 THE COURT: This is a very attractive
7 courtroom, but it is sitting inside a sea shell. You
8 have to talk up.

9 MR. DeFILIPPIS: As I was saying, it is a
10 declaratory judgment action brought by the United
11 States Fire regarding policies that were issued by U.S.
12 Fire as well as Markell, Liberty Mutual and
13 Westchester, the defendants in the case, certain of the
14 other noninsured defendants; Lens Crafters, et cetera,
15 where the case involves policies that were issued by
16 all the insured defendants to the defendant Luxottica,
17 Lens Crafters, the defendant Eyemed, certain of the
18 other noninsured defendants are additional insureds
19 under those policies that were issued to Luxottica.

20 The coverage issues arise out of certain
21 claims now pending in California regarding alleged
22 breach of --

23 THE COURT: This is a class action?

24 MR. DeFILIPPIS: I am not sure if it is
25 certified.

26 THE COURT: But is it a -- it is not

Motion

certified?

MR. DeFILIPPIS: I am not sure that it has.

THE COURT: What discovery, if any, in this action has been sought or requested.

MR. DeFILIPPIS: In this action none yet.

THE COURT: What efforts have been made in this action to try and resolve the coverage issue?

MR. DeFILIPPIS: Well, your Honor, given that --

THE COURT: I don't need details.

MR. DeFILIPPIS: At this point it is my understanding that we are going to receive a motion to dismiss from the noninsured defendants. There really have been no efforts to try to resolve the issue at this juncture. We have only just received answers from the insured defendants within the past month and assuming that we get the motion, I think it is due today from the noninsured defendants, and we will response to it as appropriate, but there hasn't been any type of discussions as far as --

THE COURT: So the action was filed without an attempt before the action was filed to try to resolve the coverage claim dispute?

MR. DeFILIPPIS: Unless there was discussions in California, of which I am not aware, no, there have

1 Motion

2 been none in New York by any of the New York attorneys.

3 And frankly, your Honor, I don't think --
4 U.S. Fire's position is there is no coverage or that at
5 a minimum no coverage until the underlying policies
6 have been exhausted. There has been no counter
7 position to that which would lend itself to any type of
8 discussion regarding settlement.

9 THE COURT: And the status of the California
10 action, which is Lens Crafters, what is the status?

11 MR. DeFILIPPIS: They will have to answer.
12 Neither has mediation been scheduled. U.S. Fire is not
13 a party to that.

14 THE COURT: Who wants to speak on behalf of
15 the defendants, Mr. DeNatale?

16 MR. DeNATALE: If I may.

17 THE COURT: Which defendants do you represent?

18 MR. DeNATALE: We represent Luxottica U.S.
19 Holding Corp., the United States Shoe Corporation, Lens
20 Crafters, Eyemed Vision Care, LLC, and Eyexam of
21 California.

22 Thank you, your Honor. It is an honor to
23 appear before the Commercial Division of the Court. I
24 hope the Court won't mind me saying I hope an honor
25 that is short lived.

26 THE COURT: I could say that I would join in

1 Motion

2 that, assuming the case would resolve in which
3 everybody is happy.

4 MR. DeNATALE: A couple of the answers to the
5 Court's questions. The underlying cases of the
6 punitive class action of a million California consumers
7 that alleges that activities that Lens Crafters' 90
8 California stores violated the privacy rights, the
9 medical confidentiality rights of the plaintiff class,
10 that has not been certified yet. The class motion is
11 pending.

12 THE COURT: Is there a schedule in that
13 action?

14 MR. DeNATALE: Yes, we have had three
15 mediation sessions. We have met with the U.S. Fire
16 three times in California. There have been three
17 mediation sessions, two of which U.S. Fire attended and
18 the last one was July and they did not citing the basis
19 to attend that mediation, and there is another one in
20 the --

21 THE COURT: Say that again. Because of this
22 litigation U.S. Fire has refused to attend litigation.

23 MR. DeNATALE: Right, two mediations in
24 California.

25 THE COURT: This is --

26 MR. DeNATALE: It gets confusing. The Snow

Motion

case is in the California state court. The coverage actions that have been ongoing for the last three years is the Northern District of the California Court. There is the Snow action case in San Francisco.

THE COURT: Who is the Superior Court that has this?

MR. DeNATALE: Richard Kramer.

THE COURT: And who is the District Judge.

MR. DeNATALE: Judge Armstrong.

THE COURT: Is there a local counsel that U.S. Fire has been using.

MR. DeNATALE: Yes.

THE COURT: A different firm?

MR. DeNATALE: Pardon me.

THE COURT: A different firm, Squire Sanders. They represent U.S. Fire in the California lawsuit. Squire, Sanders and Dempsey and Judge Kramer.

The judge who is handling the underlying class action, U.S. Fire is to attend the July 26th mediation.

MR. DeNATALE: And that is what I meant when I said U.S. Fire refused to attend that mediation.

THE COURT: They tried to attend the July 22nd mediation?

MR. DeNATALE: 26.

THE COURT: 26?

1 Motion

2 MR. DeNATALE: Yes.

3 THE COURT: And they were called to attend?

4 MR. DeNATALE: Yes.

5 THE COURT: What has Judge Kramer done about
6 that?

7 MR. DeNATALE: He has not done anything to our
8 knowledge. There is a status conference before him
9 next week, and I think he is going to then set a
10 hearing date on the class certification motion for the
11 underlying Snow class action.

12 THE COURT: Just a second.

13 Go ahead.

14 MR. DeNATALE: So there is also the coverage
15 action in California. We filed a coverage action
16 against the primary insurers including Liberty Mutual
17 three years ago. The District Court granted -- there
18 was a need to defend the Snow action, and then told us
19 that our indemnity claims were not right yet, so we
20 asked to dismiss the indemnity claim and we did, and
21 the Court ordered if any of the parties to that lawsuit
22 wanted to refile their indemnity claim, they had to do
23 so in California in the District Court. That is up on
24 appeal now in the 9th Circuit.

25 U.S. Fire knew about that lawsuit but chose to
26 file here in New York in its declaratory relief claim.

1 Motion

2 We then filed our indemnity claim in California and
3 that is getting related back to the first case in front
4 of the Judge Armstrong.

5 THE COURT: You said there was a motion filed
6 to dismiss --

7 MR. DeNATALE: No, your Honor, the day before
8 you left on vacation you had a telephone conference
9 where you addressed our motion letter. You gave us the
10 right to go forward with our motion and you set a
11 hearing scheduled for today. We are filing our briefs
12 and it was set for a hearing here in this court on
13 October 29.

14 THE COURT: And that is a motion to dismiss on
15 the ground that it was a prior act, pending
16 jurisdiction.

17 MR. DeNATALE: Yes, your Honor, also on form
18 non conveniens grounds under the CPLR to dismiss this
19 case in favor of the California coverage action given
20 the overall contacts in California and prior coverage.

21 THE COURT: And is there any -- is there any
22 other grounds in that motion besides form non and prior
23 action.

24 MR. DeNATALE: Two others. For one party,
25 Eyexam, we included for lack of jurisdiction. Eyexam
26 is only operating in California. It is not licensed to

1 Motion

2 do business in New York. It has never done business in
3 New York.

4 THE COURT: And the second and third ground or
5 the fourth ground.

6 MR. DeNATALE: Three of the defendants in this
7 case are not sued in the other underlying class action
8 and not seeking insurance here, so we believe they are
9 improper parties, so for three of them we moved to
10 dismiss on that ground also.

11 THE COURT: Anything else I should know.

12 MR. DeNATALE: I think that that covers it,
13 your Honor.

14 THE COURT: All right, Mr. Stuart, anything
15 you want to add?

16 MR. STUART: No, your Honor. I think
17 Mr. DeNatale fairly well covered it.

18 THE COURT: Is there any reason that anybody
19 can think of why I shouldn't continue what would be
20 normal practice under the CPLR and that is the stay of
21 discovery pending the resolution, which sounds to me
22 like these are serious motions; and if I grant them,
23 there would be a waste of time to do any discovery.

24 MR. DeFILIPPIS: Yes, I do have something to
25 say, Judge.

26 THE COURT: Go ahead.

1 Motion

2 MR. DeFILIPPIS: Your Honor, right now just as
3 a point of clarification as far as U.S. Fire's
4 involvement in mediations in California, they only
5 attended to monitor them. They weren't actively
6 engaging --

7 THE COURT: Do I have authority to order U.S.
8 Fire to at least attend the mediations that are ongoing
9 in the Superior Court in California?

10 MR. DeFILIPPIS: I am sorry?

11 THE COURT: Do I have the authority to sign an
12 order directing that U.S. Fire is to either participate
13 in or monitor, at the very least attend the mediation
14 sessions in the State of California?

15 MR. DeFILIPPIS: I don't believe you do. I
16 don't know if you do.

17 THE COURT: I am asking you.

18 MR. DeFILIPPIS: I don't know the answer.

19 THE COURT: You don't know the answer.

20 Mr. DeNatale, do you know the answer?

21 MR. DeNATALE: I can't say I can cite the
22 court authority, but I would think since U.S. Fire is a
23 party in front of this Court and voluntarily filed an
24 action in this Court, you can order U.S. Fire to attend
25 the session just like you can order them to attend a
26 deposition in California.

1 Motion

2 THE COURT: Why don't you provide to me in
3 writing a proposed order directing U.S. Fire to either
4 attend, participate or monitor, to use the phrase of
5 Mr. DeFilippis, in the mediation proceedings in the
6 class action and/or coverage actions pending in
7 California, and Mr. DeFilippis will have an opportunity
8 to oppose that motion. If not, he will not, but I
9 won't do anything here today, but it seems to me that
10 at the very least even if I don't have the order, the
11 power to order it, Mr. DeFilippis should carry back the
12 message to his client that in the strongest possible
13 terms it is the view of this Court that U.S. Fire
14 should attend.

15 So let's go on now to state the issues.

16 MR. DEFILIPPIS: If I may point out there is a
17 motion to dismiss by U.S. Fire --

18 THE COURT: You don't need to tell me and you
19 don't have to respond to the numbers of cases that are
20 pending in this division. Motions to dismiss are
21 pending. Mediations are simultaneous proceedings and a
22 number of times I have finished a decision, about the
23 put pen to paper and have been told the case was
24 resolved to an outside mediation. So I am not going to
25 argue with you about it, but I think your clients will
26 understand what my views are on the subject.

1 Motion

2 Do you want to say anything more about it on
3 that point, because you will deal with that and I will
4 deal with that as necessary, but let's deal with the
5 state.

6 Is there any reason why we shouldn't stay
7 discovery pending decision on the motion.

8 MR. DeFILIPPIS: Well, this case was filed in
9 May and we have extended time to all the defendants to
10 make their response or in the case of Lens Crafters to
11 file their motion. We brought this case to prosecute
12 this case and to see it through. There is no reason
13 why at a minimum documentary disclosure cannot begin.

14 If anything if you are interested in seeking
15 resolution in the case, it would make all the sense in
16 the world to make sure the parties all have each
17 other's policies and can at least look at what the
18 coverage is.

19 THE COURT: Have you served documents yet?

20 MR. DeFILIPPIS: Not yet, but we can do it
21 whatever date your Honor wants and we will have it
22 done, at least to get the ball rolling.

23 Obviously I am at a disadvantage.

24 Mr. DeNatale is essentially laying out all the points
25 of the motion. I have not seen them, so it is
26 difficult for me to respond to that. I would submit

1 Motion

2 that there is a reason to keep this Court in New York.

3 THE COURT: I will deal with that.

4 MR. DeFILIPPIS: The assumption you want to
5 stay away from discovery, that this motion is going to
6 succeed --

7 THE COURT: I am not making any assumption. I
8 don't mean to communicate that. I am just suggesting
9 that where there is an ongoing litigation in another
10 jurisdiction and where I will assume that the discovery
11 process is both in California and --

12 MR. DeFILIPPIS: Your Honor.

13 THE COURT: -- and ongoing for three years and
14 if I issue an order today directing the preservation of
15 all documents why shouldn't that be sufficient.

16 MR. DeFILIPPIS: There is a little bit that
17 needs to be cleared up. The 2004 litigation U.S. Fire
18 was not party to that litigation. We thought Liberty
19 mutual --

20 THE COURT: Is that the State or Federal?

21 MR. DeFILIPPIS: That is the 2004 action. It
22 didn't have anything to do with U.S. Fire.

23 THE COURT: Is that a Northern District
24 action?

25 MR. DeFILIPPIS: Yes. If you are relying on a
26 California case --

1 Motion

2 THE COURT: Excuse me, maybe I am not making
3 myself clear. You just said 2004 action. I want to
4 know which action you are referring to?

5 MR. DeFILIPPIS: The action pending now is
6 subsequent to this action. The declaratory judgment
7 was --

8 THE COURT: That may well be. You referred to
9 a 2004 action. What was that?

10 MR. DeFILIPPIS: It was against certain other
11 insurers, not U.S. Fire, for which a duty to defend was
12 resolved and it is now on appeal to the 9th Circuit.

13 THE COURT: That was a Federal.

14 MR. DeFILIPPIS: Yes.

15 THE COURT: That was my question.

16 MR. DeFILIPPIS: I am sorry.

17 THE COURT: Okay.

18 MR. DeFILIPPIS: But at this point to stay
19 this action on a motion we haven't seen, at least we
20 can start with the documents. I am sure that
21 discovery -- I don't want to overcome this case. It is
22 really a simple declaratory judgment case.

23 We can put off depositions until next year and
24 see what happens with the motion, but there is no
25 reason why the insurer, this is really, you know, a
26 question of coverage. At least the insurer defendants

1 Motion

2 should start to exchange documents. There is no reason
3 to wait for the motions to dismiss to be argued.

4 THE COURT: Anything else?

5 MR. DeFILIPPIS: Nothing.

6 THE COURT: Mr. DeNatale?

7 MR. DeNATALE: Your Honor, on that issue I
8 think what your Honor proposes does make sense. We
9 would prefer not to be fighting a two-front war in
10 California and New York on discovery. I know this case
11 has been involved three months and U.S. Fire has a not
12 propounded a request yet, and you set an order for the
13 briefing schedule without any provision U.S. Fire
14 didn't ask for any provision for discovery. I think
15 document preservation makes sense.

16 I am also happy to give counsel all the
17 insurance policies. They will be provided in
18 California if they haven't already, but we will give
19 New York counsel all the policies at issue and other
20 than that I would ask discovery be stayed until the
21 court has an opportunity to rule on a motion.

22 MR. DeFILIPPIS: If I may.

23 THE COURT: Sure.

24 MR. DeFILIPPIS: First just in response to the
25 point we have not propounded any discovery responses we
26 have not had a responsive pleading from the party to

1 Motion

2 which we would be propounding those responses, so as I
3 understand it in New York somebody answers or files a
4 motion and they appear in the action and you start
5 discovery.

6 As far as the stay that you are looking at the
7 same argument is being made in California, you have two
8 cases that say well, let's hold off and see what
9 happens over there. So if they are making the same
10 argument there and the same argument here, nothing will
11 go forward. There is no reason for this case not to
12 move forward.

13 THE COURT: All right, I will give you the
14 last word Mr. DeNatale.

15 Unless there is something else to add, I will
16 be happy to hear from them and then I will tell you
17 what I intend to do.

18 MR. DeNATALE: I just want to clarify a
19 misstatement. We are not asking for a discovery stay
20 in California. We think discovery can and should
21 proceed in the California coverage action. So if U.S.
22 Fire wants those documents, they will have that vehicle
23 to get them.

24 THE COURT: All right, there is a list of
25 proceedings. You should pick them up on the table over
26 there, which gives an indication of how I conduct

Motion

myself. I would like this case to be electrically filed. Stop in Room 119 and then you will know what to do.

I take hard copies of all electric filed documents and you can send them directly to the courtroom or to chambers.

With regard to the discovery I am staying discovery with the understanding that the defendant will provide all insurance policies at issue to the plaintiff within 30 days.

I am further issuing an order that all parties are to preserve all documents relating to any issues in this case and that includes not only hard copies but includes electrically created material so there is no issue down the line.

With regard to the question of whether the plaintiff can be compelled to participate in a mediation or proceeding outside of this jurisdiction, I leave that for the attorneys to think if it is appropriate to submit such a request. I don't know if it is. I don't know if I have authority to do that or not.

I will deal with that issue when it comes up. At the very least I already indicated it would seem to me that the client should be advised as I said that it

Motion

is my hope that they would participate. Enough said on that issue.

You are due back here on what was the date?

MR. DeNATALE: October 29th.

THE COURT: Did I give you a time?

MR. DeNATALE: Yes, 9:30 to 11.

THE COURT: That is on the motion?

MR. DeNATALE: On the motion, yes, your Honor.

THE COURT: And the only other matter is I will sign the pro hoc vice if you give me the paper and I will do that.

Anything else we should be doing?

MR. PORTUGUESE: Your Honor, to be on the safe side will they also produce the policy to the other defendants as well so we all have the same set of policies?

THE COURT: Sure.

So they will produce it to all defendants and the carriers.

Anything else?

(Continued on next page.)

- - -

1 Motion

2 MR. DeNATALE: No.

3 THE COURT: Thank you.

4
5
6 CERTIFIED TO BE A TRUE
7 AND CORRECT TRANSCRIPT

8
9
10
11
12 MYRON CALDERON
13 OFFICIAL COURT REPORTER